

RESPONSE TO NOTICE OF INQUIRY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
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Modifying the Commission's Process to Avert)
Harm to U.S. Competition and U.S. Customers) IB Docket No. 05-
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Caused by Anticompetitive Conduct)
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COMMENT BY THE JAMAICAN MINISTRY OF COMMERCE, SCIENCE & TECHNOLOGY TO NOTICE OF ENQUIRY PUBLISHED IN THE FEDERAL REGISTER ON SEPTEMBER 7, 2005

(1) INTRODUCTION

1. The Notice of Inquiry (NOI) seeks comments on ways to improve the process available to the Federal Communications Commission ("the Commission") to protect U.S. consumers from the effects of anticompetitive or "whipsawing" conduct by foreign carriers. The NOI specifically alleges that Jamaican carriers used circuit disruptions to force U.S. carriers into settlement rate increases. Through this process, the Commission intends to consider alternative approaches to avert circuit disruptions or blockages, and ways to streamline their procedures in order to respond more effectively to such allegedly anticompetitive conduct. In addition to the above stated objective, the NOI also raised several collateral issues and questions for discussion and commentary.
2. In this document the Ministry of Commerce, Science & Technology (the "Ministry") sets out the position of the Government of Jamaica on each issue/question, in an effort to provide further insight into Jamaica's

experience in its newly emerging, competitive telecommunications market and to demonstrate that the recent experience with the Jamaican carriers ought not to be categorized as engaging in anti-competitive behavior designed to exploit market power in the negotiation of settlement rates.

3. Jamaica receives more than 70% of its incoming international telephone calls from the U.S.A. and accordingly its entire telecommunications market is completely vulnerable to any regulatory or commercial activity in the U.S.A. In this context, U.S. carriers exercise a virtual monopoly over the Jamaican market, and despite the advent of competition in the international services sector, this reality remains largely unchanged.
4. In 2000 Jamaica liberalized its telecommunications market from a monopoly-based industry to one that thrives on competition consistent with global trends and its WTO obligations. Throughout the years of monopoly service, Jamaica like many other similarly positioned economies, derived over 80% of its telecommunications revenues from international incoming calls. This in turn was a ready source of capital for servicing universal service obligations and for expanding the domestic network and services. With the advent of competition, the rapid liberalization process resulted in the persistent lowering of settlement rates to accord with the principles of cost oriented pricing and there is now an urgent demand for international trading partners to re-examine the basis on which certain principles are applied, and to give serious consideration to the macro-economic issues which touch and concern the agreements between carriers for the exchange of international traffic.
5. Consistent with its obligations arising under the Telecommunications Act 2000 from the liberalization of the telecommunications sector the Government of Jamaica assumed full responsibility for universal service policy, planning and its implementation. In this regard, it embarked on a full scale public consultation which lasted over a period of two years and culminated with a Recommendation¹ from the regulatory agency, the Office of Utilities Regulation (“OUR”) on the form, source of funding, and scope of the desirable universal service programme. The source of funding required contributions from all licensees, and an analysis of existing contributions revealed that domestic services were already contributing approximately JA\$2B annually and that international services continued to be exempt from both universal service and consumption taxation. The

¹ Recommendation Document No. TEL.2004/07, the Office of Utilities Regulation

universal service levy was proposed for implementation in May 2005, and this was postponed to June 2005 in order to facilitate inter-government discussions between members of the Ministry, the NTIA, the Department of Commerce, the Office of the US Trade Representative, State Department, the major U.S. carriers, and the Commission's International Bureau. In addition the Ministry wished to ensure that the Jamaican carriers were allowed sufficient time to negotiate new rates, if necessary, in accordance with the terms of their contracts, and make such adjustments as were necessary to comply with the new statutory obligation.

6. Two delegations from Jamaica visited Washington during the months of April and June 2005, (before and after the imposition of the levy) and in this regard we believe that the Ministry undertook reasonable steps to alert both the U.S. Government and the U.S. carriers of the impending change in local law. It is against this background that we have sought to provide comments in these proceedings.

(2) ISSUES/QUESTIONS RAISED BY THE COMMISSION

Circuit Disruption

7. The Commission expressed its concern that circuit disruption on the Jamaica route undermined the benefits which U.S. consumers ought to derive from the flexibility to negotiate dissimilar settlement arrangements with foreign carriers. This concern is unfounded as regards Jamaica. A careful examination of the facts and circumstances surrounding the recent imposition of the universal service levy by the Government of Jamaica would support this position. It was brought to the attention of the Ministry that, in response to the imposition of the levy, the Jamaican carriers, requested all foreign carriers to pay an increase in rates in accordance with the terms of their contracts, and the parties commenced negotiations with the understanding that the rate increase was necessitated by the recent change in Jamaican Law; which the Jamaican carriers were obliged to obey or risk losing their licences.
8. The U.S. carriers failed to complete their negotiations with the Jamaican carriers to meet the June 2005 deadline and this resulted in service disruptions. In the absence of an effective dispute settlement mechanism for this unique set of circumstances; and with the U.S. carriers' perception

that the Commission stands ready to order U.S. carriers to withhold payments, and/or otherwise endorse the objection to increased rates, the Jamaican carriers could not afford to continue the provision of services without any guarantees of payment. Nor could the Government of Jamaica offer guarantees of payment to the Jamaican carriers, in the event that the foreign carriers ultimately failed to fulfill their contractual obligations. The Jamaican carriers have categorically denied the allegation of whipsawing, as the rate increases were not sought in an attempt to increase settlements for their own benefit, but were based entirely on their legal obligation to comply with Jamaican Law. In those circumstances, the actions of the Jamaican carriers can be distinguished from the anti-competitive and harmful negotiating tactic ascribed to the other countries named in the NOI. As previously indicated to the FCC and other U.S. Government Agencies, the Government of Jamaica is strongly opposed to “whipsawing” or other forms of anti-competitive conduct which result in harm to consumers and the industry as a whole.

9. It is within this context that the Jamaican carriers first brought the issue of a potential service disruption to the attention of the Ministry, to invite his intervention and in order to avoid other breaches of their licence obligations as regards their statutory and contractual obligations to local consumers. Given the carriers failure to agree new rates, and the imminence of the commencement date of the Levy, it was therefore likely that at some point in this impasse, the matter would cease to be purely commercial in nature, and could necessarily require political intervention to protect and preserve the trading relationship between the countries, as opposed to the commercial relationship between carriers. It should be noted that the Jamaican situation was not one in which a dispute between US and Jamaican carriers developed, and the Jamaican Government stepped in to protect the Jamaican carriers. On the contrary, the dispute centered around a rate increase arising from the levy imposed by law, requiring the Jamaican carriers to pay a surcharge on incoming international calls. This highlights not a competition issue *simpliciter* but the central issue of the legitimacy of the actions of the Jamaican Government in exercising its sovereign right to set policy in regard to Universal Service so as to benefit its own citizenry.

Remedies

10. The Commission’s procedures currently include a number of remedies, none of which offer any protection to foreign carriers or provide an

incentive for the continued supply of services in the absence of agreed rates. Recognizing that there can be legitimate requests for rate increases, and recognizing further that the uninterrupted exchange of telecommunications services transcends the realm of commerce, and has strong political implications, the Commission ought to consider ways in which the legitimate interests of the foreign carriers can be taken into consideration. It should be noted that there is a strong US public interest in having adequate infrastructure and services in foreign countries. The quality of transmissions improve; there are more subscribers to contact; call completion ratios move higher; and opportunities for foreign direct investment, and the sale of goods and services, increase considerably. There is also a considerable outflow of revenue from Jamaica to the U.S. in respect of equipment purchases, consultancy services, and repatriation of profits directly arising from the government-initiated liberalization of the telecommunications industry. These are all factors which could fall for consideration within the FCC's statutory mandate to make available *"a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."* 47 U.S.C. Section 151.

Circuit Blockages: Definition and Appropriateness

11. The NOI invites comments on whether there are any instances in which circuit blockages are appropriate. In Jamaica's experience, a complete failure by the parties to arrive at an agreement pursuant to subsisting contractual terms, and/or the expiration of a contract are two events which can create the basis for a legitimate suspension of service. Bilateral agreements for the exchange of traffic offer no guarantees for payment in the absence of agreed rates, and therefore no carrier should be under an obligation to provide services in the absence of an enforceable agreement. Similarly, the Government of Jamaica has no basis in law or contract to compel carriers to provide services to foreign carriers in those circumstances, without providing appropriate indemnities as required by our Constitution. In its discussions with U.S. Government Agencies and the Commission, the Ministry raised this issue for discussion, so that where governmental intervention becomes necessary, both Governments will be in agreement as to the nature, terms, and scope of such

intervention. We regard the Ministry's efforts in initiating discussion on the impending change of law and policy as a necessary component of any agreed protocol, and we remain interested in furthering the dialogue on this issue.

12. Therefore, in defining circuit disruption or blockage for the purpose of Commission's action, we encourage the Commission to exclude from its definition the suspension of services on the termination or expiration of a contract generally and in circumstances of compliance by the local carrier with domestic laws. This should include circumstances where the parties have complied fully with the procedures for negotiating new contracts or for resolving disputes under existing contracts. Consideration should also be given to the failure of the disputing party to offer or accept a reasonable compromise. In the absence of information to the contrary, the Ministry accepts that the Jamaican carriers acted in full compliance with their contracts when they sought to increase rates as a result of the change in Jamaican law; and accordingly we strongly advocate the exclusion of circumstances where carriers are complying with domestic legislation. For these purposes, we submit that the legitimacy of the sovereign exercise of Governmental authority or Parliamentary power ought not to become the subject of punitive action against the citizens of any country.

Coordination of Response with Relevant Government Agencies

13. Accepting that the Commission's interest is in preventing harm to U.S. consumers, and that the greatest benefits to all consumers can only be derived from a competitive market where market forces are allowed to prevail; the Commission should consider the extent to which its intervention can cause greater harm than good to competition. In carrying out its mandate to protect U.S. consumers, the Commission should give consideration to internal procedures that allow a fair assessment of the legitimacy or appropriateness of the conduct of the U.S. carriers who are making the complaint against named foreign carriers. Such consideration could serve to prevent the destruction of the tenuous balance that exists between unequal bargaining powers. In this regard, the Commission should also recognize that foreign administrations are likely to offer equal protection to their carriers in an attempt to restore balance. Further, with the liberalization of the telecommunications sector in Jamaica, U.S. carriers have had the opportunity to enter the Jamaican market and

compete against the local carriers. In fact this non-discriminatory opening up of the market has resulted in the lowering of settlement rates to unprecedented levels due in part to the introduction of subsidies by foreign carriers, and the facilitation of other forms of arbitrage. It should be noted with emphasis, that the Ministry has not taken action to protect the Jamaican carriers from the actions of foreign carriers instead it has encouraged the carriers to use the available civil law remedies to protect their interests.

14. Therefore, the Ministry endorses any initiative to coordinate the Commission's response with other U.S. Government agencies responsible for international trade and telecommunications policy. Arising from our recent experience, the Government of Jamaica called on the relevant U.S. Government agencies to enter into dialogue for the purpose of agreeing the protocols which would apply in situations such as these. The Ministry recognizes that each country's situation may require unique protocols, and accordingly we are not advocating the implementation of protocols for general application, but are seriously interested in forging an understanding that will apply to Jamaica, should the need arise.

Effectiveness of Commission's Orders

15. The Commission's ISP Reform policy is founded inter alia on the principle that *"...increasing settlement rates above benchmarks, establishing rate floors...that are above previously negotiated rates, or...carrying out circuit disruptions in order to achieve rate increases ...are indicia of potential anticompetitive conduct."* Whilst the Commission is fully entitled to concern itself exclusively with the interest of U.S. consumers, this objective will be difficult to achieve if it is undertaken without regard to the experience, needs, and commercial imperatives of the foreign markets and the foreign carriers which form a necessary part of the equation. The continued relevance or appropriateness of a particular benchmark, the impact and effectiveness of U.S. policies, and the developmental state of a foreign country's telecommunications market and infrastructure are all matters of concern. To ignore these completely, or to assume that the U.S. carrier is always right and deserving of protection, will ultimately harm the U.S. consumer whilst favoring the U.S. carriers' commercial well being in the short term.

16. The Ministry recognizes that while the Commission's primary mandate cannot extend to matters beyond their political and legal jurisdiction, there has always been a willingness to receive, consider and respond to the input of foreign carriers and administrations, and the Government of Jamaica has been the beneficiary of technical assistance and advice from the Commission over the years. We are therefore very interested in participating in this process in order to ensure that our own mandate to protect and promote the interests of the Jamaican consumers can be met in a manner that does not harm or offend our international trading partners.

17. The 1997 Benchmark Orders have failed to deliver any positive result to Jamaican carriers, the Jamaican economy, or even to U.S. consumers. The benefits derived from the reduced settlements have not been passed on at all, or sufficiently, to U.S. consumers. Most of Jamaica's international telephone traffic is with the US; accounting for 81% of incoming international traffic in 1999, with no apparent decline in subsequent years, particularly in light of the growing numbers of mobile customers. The continuing effect of the Commission's Benchmark Order is the rapid decline in international settlement rates from a high of US\$0.58 (in as recent as 2000) to a current low of US\$0.028. This decline in the rates has been largely fueled by the strict observance by the global community of the principle that prices for telecommunications services must be cost-based, without appropriate allowances being made for the peculiar geographic, climatic, socio-economic, and developmental limitations which apply to countries such as Jamaica. The recent Commission's publication entitled "*Trends in the International Telecommunications Industry*" shows the decrease in both traffic volumes and per minute rates for Jamaica during the period 2000 to 2003. Although Table 9 of that publication shows a decline in the per minute rate from US\$1.05 in 1993 to US\$0.027 in 2003, the rates up to June 2005 for termination on the PSTN were US\$0.03 and below.

18. The Commission's assumption that reduced settlement rates would result in lower prices to US consumers has proven to be inaccurate. The Commission's own published data reveals that retail prices in the US were largely unaffected by the reduced settlement rates and the anticipated increase in traffic did not occur. While the settlement rate averaged US\$0.08 per minute, the US consumer was paying an average of US\$0.32; the following table is instructive:

US Outbound Traffic to Jamaica

Year	Outgoing Traffic	Customer Revenue	Average Rate per minute
2000	289.3M Minutes	US\$166.8M	US\$0.58
2001	373.2M Minutes	US\$138.7M	US\$0.37
2002	524.0M Minutes	US\$168.0M	US\$0.32

(Source: FCC Annual Report 43.61; International Traffic Data)

19. In interpreting the above data, allowance must be made for the fact that the deployment of two new mobile networks in Jamaica resulted in a significant increase in the number of subscribers receiving international calls. This means that the increase in traffic volumes was likely to have been caused by that factor, and not any increased call activity resulting from the lower settlement rates. It should also be noted that while settlement rates have declined by more than 90% to date, the decline in the average rate to the US consumer has not moved at a similar pace, and this further exposes the fallacy in the assumptions.

20. The Ministry is requesting that consideration be given to the fact that Jamaica's rates are low by comparative standards, and the addition of the levy would not push them to levels that are out of line with those of other countries. Jamaica is legitimately entitled to an increase in termination rates in order to recover fixed network costs (which are not reflected in today's rates). Jamaican mobile call termination rates are also low in a global sense. The mobile termination rate is approximately U.S.\$0.13 per minute. By comparison, the average mobile call termination fee for the European Union was in the range of 14.7 euro cents as of the end of August 2004. This corresponds to a rate of US\$0.176 per minute (at today's exchange rate of roughly 1.20 dollars per euro). This is well in excess of Jamaica's rate, and is also significantly in excess of the effective rate that would result from adding the levy to the current mobile termination rate. Under current international practices, Jamaican carriers would typically use call termination charges to recover a reasonable contribution to the fixed costs associated with their networks; however, in the access deficit proceeding, the Jamaican government prevented carriers from reflecting their fixed costs in their call termination rates. To the extent that the levy corrects the resultant under-pricing of Jamaican mobile termination rates, it should be viewed as reasonable. It was not the intent to encourage Jamaican carriers to

disrupt traffic as a negotiating tactic, and we will ensure that going forward, this position is made abundantly clear.

21. It is necessary to reiterate for emphasis and clarity the reasons which lead to the recent imposition of the universal service levy in Jamaica. The responsibility for funding Jamaica's universal service obligations shifted from the incumbent monopoly operator to the Government in March 2003. The universal service fund was created from contributions made by all licensees, and will be administered on the principles advocated by the Commission and enshrined in our Telecommunications Act; that is in a transparent, non-discriminatory manner, and competitively neutral fashion, by a duly appointed board of directors. The process for defining the universal service obligation, the nature and extent of the contributions and the administration of the fund was completed in April 2005, and the levy was imposed on all licensed Jamaican carriers. The carriers in turn increased their prices to all foreign carriers, including U.S. carriers. The Ministry accepts that such price increases were inevitable and reasonable in all the circumstances. The Ministry also reiterates its willingness to engage in dialogue being cognizant of the fact that the unique problems which gave rise to the disruption of service may require protocols uniquely designed to speedily deal with similar commercial disputes between Jamaican carriers and U.S. carriers.

We value our friendly relationship with the United States, and would like to resolve any remaining matters amicably. We hope that the Commission will give serious consideration to the matters raised; particularly in light of the significant progress which we have made in liberalizing the telecommunications industry.

Submitted by
the Ministry of Commerce Science & Technology
October 7, 2005